

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CB Docket No. BO 16-251
Possible Revision or Elimination of Rules)	DA 16-792
)	

Comments of Professional Association for Customer Engagement

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I. Introduction

The Professional Association for Customer Engagement (“PACE”)¹ respectfully submits these Comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) above-cited request for comments regarding the possible revision or elimination of rules. The FCC’s rule review seeks to identify and modify rules that have or might have “a significant economic impact on a substantial number of small entities.”² PACE respectfully requests that the Commission revise its rules to clarify that (1) a system is not an automatic telephone dialing system (“ATDS”) unless it has the capacity to dial numbers *without human intervention*; and (2) a system’s “capacity” is limited to what it is capable of doing, without further modification, *at the time the call is placed*. The Commission can accomplish this clarification by (1) defining the term “capacity,” as used in the Telephone Consumer Protection Act (“TCPA”) and the Commission’s TCPA regulations, as “the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered” and (2) modify the definition of ATDS in 47 CFR 64.1200(f)(2) by adding the phrase “without human intervention” to the end of the definition.

Additionally, PACE requests that the Commission define the term “called party” as used in 47 U.S.C. § 227(b)(1)(A) as “the expected recipient of the call at the time the call is placed.” The FCC’s current interpretation of “called party” as the “current subscriber or customary user” of the number creates substantial potential liability for small businesses and infringes on Congress’

¹ PACE is the only non-profit trade organization dedicated exclusively to the advancement of companies that use a multi-channel approach to engaging their customers, both business to business and business to consumer. These channels include contact centers, email, chat, social media, web and text. Our membership is made up of Fortune 500 companies, contact centers, BPO’S, economic development organizations and technology suppliers that enable companies to contact or enhance contact with their customers.

² FCC Seeks Comment Regarding Possible Revision or Elimination of Rules (FCC, Dec. 28, 2016) at ¶ 1.

intent that the TCPA should balance privacy rights of individuals with commercial freedoms of speech and trade.

Clarifying the ATDS definition and promulgating a common sense definition of “called party” would significantly reduce the burden placed on small businesses who are scrambling to comply with uncertain and often impossible regulations. PACE recognizes that an appeal of the Commission’s 2015 Omnibus Declaratory Ruling and Order (“2015 Order”),³ which greatly expanded the ATDS definition and created the current interpretation of the term “called party”, is currently pending in the D.C. Circuit. The rule review process, however, provides the Commission with an opportunity to reconsider its 2015 Order.

II. ATDS Definition

A. The Definition of ATDS Does Not Include Equipment that Lacks the Capacity to Dial Telephone Numbers Without Human Intervention

ATDS is defined as “equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁴ Prior to the 2015 Order, the Commission provided little guidance on the scope of this term outside its 2003 Report and Order and a 2008 Declaratory Ruling, which both addressed a specific type of predictive dialing solution that involved pairing predictive software with an autodialer.⁵ Specifically, the Commission affirmed that pairing such software with

³ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (rel. July 15, 2015). The 2015 Order is the subject of pending litigation in *ACA International, et al. v. FCC*, Case No. 15-1211 (D.C. Cir.).

⁴ 47 U.S.C. § 227(a)(1); *see also* 47 CFR 64.1200(f).

⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 131 (2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling 23 FCC Rcd 559 at ¶ 12 (2008).

autodialer equipment would not make the autodialer equipment suddenly exempt from the autodialer restriction because of the software's ability to dial from a calling list.⁶

Although the term "human intervention" does not appear in the definition of ATDS, the second prong of the definition (the capacity to dial telephone numbers) presupposes that the equipment has the capability of *automatically* dialing telephone numbers rather than being capable of dialing the numbers only after being prompted to do so by a human. Indeed, the Commission has stated that "the statutory definition contemplates *autodialing equipment* that either stores or produces numbers."⁷ Although PACE believes the "either stores or produces numbers" language is an oversimplification of the first prong of the definition (it would mean that the Commission has effectively removed the "using a random or sequential number generator" language from the statutory definition, contrary to the TCPA), this demonstrates the Commission's tacit acknowledgment that the capacity to dial *without human intervention* is a prerequisite to the second prong of the definition.

This distinction becomes even more critical when you consider the impact of the Commission's oversimplification of the first prong. If equipment is an ATDS merely because it has the capacity to: (a) store or produce numbers to be called; and (b) dial such numbers after being prompted by a human, virtually every modern telephone (including smart phones) could conceivably be an ATDS because they have the capacity to both store numbers and dial them upon command. Under this interpretation, no calls can be made from one cell phone to another without the called party's prior express (written) consent, regardless of the parties involved or the purpose

⁶ *Id.* PACE also reiterates its long-standing position that a predictive dialer is not an ATDS unless it has the capacity to store or produce numbers *using a random or sequential generator*.

⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 132 (2003).

of the call.⁸ This is an absurd interpretation that contravenes both Congressional intent and sound public policy. The only logical interpretation is that the second prong requires the equipment to have the capacity to dial telephone numbers *without human intervention*.

B. A System's "Capacity" is Limited to What it is Capable of Doing, Without Further Modification, at the Time the Call is Made

In the 2003 Report and Order, there is an important discussion regarding the capacity of equipment to make calls “when paired with certain software.”⁹ The Commission did not specify whether it was contemplating the capacity of the equipment when paired with the software *at the time the call is made* or its theoretical capacity (i.e. its capacity if the software were installed in the future). In the 2015 Order, the Commission announced that “capacity” is not limited to what the equipment is capable of doing in its “current configuration[,] but also includes its potential functionalities,” that is, what it could do if modified (at least if those possible modifications are not too “theoretical” or “attenuated”).¹⁰ PACE argues that a piece of equipment's “capacity” must be limited to what it is capable of doing *at the time the call is placed* rather than taking into account what the “capacity” of the equipment would be if it were modified or altered in some way.

The term “capacity” is not defined in the TCPA or the Commission's regulations. When a statute does not define a term, the everyday meaning of the term governs.¹¹ Relevant dictionary

⁸ Chairman Pai presciently identified the potential scope of the new ATDS interpretation in his dissent to the 2015 Order: “So under the *Order's* reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a ‘rotary-dial phone’—is an automatic telephone dialing system.” *2015 Order*, Pai Dissent at 8075.

⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 131 (2003).

¹⁰ 2015 Order ¶¶ 16, 18.

¹¹ See *e.g.*, *Watson v. United States*, 128 S. Ct. 579, 583 (U.S. 2007); *United States v. Hildenbrand*, 527 F.3d 466, 476 (5th Cir. Tex. 2008).

definitions for the term capacity (and example sentences provided in these dictionaries) include the following:

Dictionary Definition	Example Sentences in the Dictionary
"The ability to do something." ¹²	"Her poor health limits her earning capacity."
"The facility or power to produce, perform, or deploy." ¹³	"A plan to double the factory's capacity."
"Actual or potential ability to perform, yield, or withstand." ¹⁴	"The capacity of the oil well was 150 barrels a day."

As demonstrated by the examples provided in these dictionaries, each definition pertains to the **current** capacity of a person, organization or object. For example, the capacity of the factory in the second example above is measured based on its current limitations. Once the factory is modified, its capacity changes (doubling in this case). The clear takeaway from these definitions is that, although the capacity of an object is not necessarily limited to the manner in which it is currently being used, it is limited to its current capabilities. The Commission should, therefore, reject the definition of “capacity” announced in the 2015 Order and adopt a common sense definition comporting with the everyday meaning of the term “capacity”, i.e. a system's “capacity” is limited to what it is capable of doing, without further modification, ***at the time the call is placed.***

This interpretation is not only required by principles of statutory construction, it is also sound public policy. If the term capacity encompasses equipment’s theoretical capacity, then the door is left open to continuous and fervent litigation against callers from small mom & pop businesses to the largest corporations. In fact, as reported by WebRecon LLC, litigants filed 4,860

¹² Macmillan Dictionary, available at: <http://www.macmillandictionary.com/us/dictionary/american/capacity>.

¹³ Merriam-Webster Dictionary, available at: <http://www.merriam-webster.com/dictionary/capacity>.

¹⁴ Dictionary.com, available at: <http://dictionary.reference.com/browse/capacity>.

TCPA lawsuits in 2016 which is more than the number of TCPA lawsuits filed in 2007-2013 combined.¹⁵ Between just 2015 and 2016 TCPA filings increased 31.8%.¹⁶ Recent reported settlements have reached as high as \$75,000,000.¹⁷ Simply stated, one TCPA lawsuit could cripple a small business.¹⁸

III. Called Party Definition

The Commission's current interpretation of "called party" is erroneous and does not comport with common sense. The natural meaning of "called party" is the expected recipient of the call. As described by Chairman Pai, suppose "[y]our uncle writes down his telephone number for you and asks you to give him a call," when "you dial that number" it would make sense to "say you are calling . . . [y]our uncle," and to refer to your uncle, the person "you expect to answer," as the "called party."¹⁹ This categorization would remain true even if "your uncle wrote down the wrong number," "lost his phone and someone else answered it," someone else "actually pays for the service," or his number was reassigned.²⁰ Rather than adopt the natural definition of "called party," the Commission instead defined it as the number's "current subscriber or customary user."²¹

¹⁵ *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (WebRecon LLC, Jan. 24, 2017), available at <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/> (last accessed Feb. 22, 2017).

¹⁶ *Id.*

¹⁷ *\$75M Capital One TCPA Class Deal OK'd; Attorneys' Fees Cut from \$22M to \$15M* (Bloomberg BNA, Feb. 23, 2015), available at <https://www.bna.com/75m-capital-one-n17179923290/> (last accessed Feb. 22, 2017).

¹⁸ PACE also encourages the Commission to investigate areas for TCPA reform that would eliminate class actions in which the plaintiff does not suffer injury and reduce the prevalence of attorney-driven litigation by mandating early evidentiary support of a plaintiff's claims and a stay of discovery pending resolution of F.R.C.P. 12 and other key motions. Additional ideas for reform can be found in the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, currently pending before Congress.

¹⁹ *2015 Order*, Pai Dissent at 8078.

²⁰ *Id.*

²¹ *2015 Order* ¶ 73.

The current interpretation of called party is fraught with peril for small businesses. First, no authoritative list exists that can, with 100% reliability, identify all reassigned numbers so that businesses can scrub reassigned numbers from their calling lists.²² Second, although the Commission provided a one call safe harbor, businesses are often unable to determine whether a number has been reassigned from one call or text which may not be answered or may be answered by a non-descriptive voicemail.²³ Third, no database exists, nor could one exist, of the “customary user” of every phone number. Businesses, therefore, risk substantial liability under the current called party definition.

Defining the called party as the current subscriber or customary user of a number also does not comport with Congressional intent or First Amendment values. Congress, in passing the TCPA, sought to balance “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade . . . in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”²⁴ The Commission’s definition destroys the balance Congress intended. If every call risks triggering strict liability, callers will refrain from calling in the first place.²⁵ Likewise, consumers will not be able to receive the communications they desire such as sale announcements, package delivery confirmations or concert ticket availability alerts. Such restrictions chill speech of all types through telephonic means and raise substantial First Amendment concerns.

²² Each year, around 37 million telephone numbers are reassigned from one subscriber to another. 2015 Order, Pai Dissent at 8077. The database suggested by the Commission claims to include only “80 percent of wireless and hard-to-find phone numbers.” 2015 Order ¶ 86 fn. 301.

²³ Text messages are especially problematic because the sender of the message receives no feedback from the recipient unless the recipient voluntarily responds to the message.

²⁴ 47 U.S.C. § 227 note.

²⁵ See e.g., Nat’l Rural Elec. Coop. Ass’n Nov. 17, 2014 Comments at 6 (some rural utilities have shut down programs that involve contacting consenting customers “because of the risk of litigation” over reassigned numbers); Abercrombie and Hollister Co. May 13, 2015 Ex Parte at 4 (Abercrombie has curtailed texting to avoid reassigned-number liability).

The Commission should resolve this issue by amending its TCPA regulations to include a reasonable definition for the term “called party”. Specifically, “called party” should be defined as “the expected recipient of the call at the time the call is placed.” In so doing, the Commission will relieve a substantial burden on businesses (large and small), preserve Congress’ goal of balancing the rights and interests of callers and called parties, and defend First Amendment values.

IV. Conclusion

For the foregoing reasons, the Commission should revise its rules by: (1) defining the term "capacity," as used in the TCPA and Commission's rules, as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered;" and (2) modifying the definition of "automatic telephone dialing system" in 47 CFR 64.1200(f)(2) by adding the phrase "without human intervention" to the end of the definition. Further, it should define the term “called party”, as used in 47 U.S.C. § 227(b)(1)(A), as “the expected recipient of the call at the time the call is placed.” These clarifications would relieve significant burdens from small businesses, promote Congress’ interests balancing approach, and protect First Amendment freedoms.

Respectfully submitted,

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